SHIM YEN LIN v. CEDRIC WONG KING TI

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEONARD DAVID SHIM JC
[SUIT NO: BKI-22NCVC-24-3-2014]
26 APRIL 2021

CIVIL PROCEDURE: *Injunction – Mareva injunction – Application for – Judgment on liability entered – Whether there were assets within jurisdiction of court – Whether there was real risk of dissipation of assets to defeat judgment*

EVIDENCE: *Affidavit – Affidavit in support – Admissibility – Affidavit in support affirmed before Justice of the Peace – Whether Justice of the Peace competent to administer oath in respect of affidavits filed in High Court proceedings – Whether affidavit in support properly affirmed – Whether affidavit in support defective – Whether curable – Rules of Court 2012, O. 41 r. 1, O. 2 r. 1 – Courts of Judicature Act 1964, s. 11 – Subordinate Courts Act 1948, s. 99(2)*

A judgment on liability had been entered against the defendant who, based on the plaintiff's affidavit in support ('encl. 141'), had assets within the jurisdiction. According to the plaintiff, there was a real risk of dissipation of the assets and any judgment sum awarded by the court in favour of the plaintiff after the trial of the assessment of damages would remain unsatisfied. This was an application by the plaintiff for a post-judgment *Mareva* injunction ('encl. 140') to, *inter alia*, restrain the defendant from dissipating or disposing of his assets. The defendant applied to set aside and discharge the *ex parte Mareva* injunction order ('encl. 169'). In addition, the defendant raised preliminary objections to encl. 140 and encl. 141 on the reasons that: (i) the plaintiff's affidavit in support was affirmed before a Justice of the Peace ('JP'), who was not competent to administer oath in respect of affidavits filed in High Court proceedings. The plaintiff's affidavit in support was not properly affirmed in accordance with O. 41 r. 1 of the Rules of Court 2012 ('ROC') read together with s. 11 of the Courts of Judicature Act 1964 ('CJA') and the jurat thereto failed to comply with the strict requirements of O. 41 and Form 74 of Appendix A of the ROC. The oath of affirmation was not administered by a competent person in accordance with the mandatory provisions of the ROC. Accordingly, encl. 140 could not be sustained. The plaintiff's affidavit in support was therefore defective and could not be cured as the very basis of the jurat and the affirmation was in itself defective; (ii) the plaintiff's *ex parte* notice of application remained unsupported by any affidavit, in breach of O. 29 r. 1(2) and (2A) of the ROC, and accordingly, was wholly defective and a non-starter; (iii) both the notice of application and the unsealed copy of the *ex parte Mareva* injunction order served had no return date and this was in breach of the mandatory requirement of O. 29 r. 1(2BA) of the ROC; and

A (iv) the sealed copy of the *ex parte Mareva* injunction order had not been served within seven days from the date of the order in accordance with the mandatory requirements of O. 29 r. 1(2BA) of the ROC.

Held (dismissing encl. 169; allowing encl. 140):

B **(1)** Order 41 r. 1(7) of the ROC does not state that an affidavit must be affirmed before and attested by a Commissioner of Oaths. Neither does O. 41 r. 1(7) expressly provide that a JP is not competent to attest an affidavit to be filed in the High Court. Pursuant to the Fourth Schedule of the Subordinate Courts Act 1948 ('SCA') read with the Subordinate C Courts Act (Extension) Order 1980, *ex officio* second class Magistrate includes Assistant Registrar of the Subordinate Courts. Assistant Registrars of the Subordinate Courts falls under the definition of Registrars under s. 2 of the SCA. The words 'any Registrar' in s. 11 of the CJA is wide enough to include Assistant Registrar of the subordinate courts. Hence, by virtue of s. 99(2) of the SCA, a JP falls within the D definition of Registrar under s. 11 of the CJA. (paras 21-23)

(2) Applying case authorities to the instant case, a JP in Sabah is competent to attest an affidavit for any legal proceeding in the subordinate court and the High Court. As a JP is empowered by law to administer the oath E and attest affidavit in Sabah, the defendant was not prejudiced by the attestation by a JP of the affidavit in support. If there was any defect to the attestation of the affidavit in support, it would be a mere irregularity curable under O. 2 r. 1 and admissible by the court under O. 41 r. 4 of the ROC. (paras 25 & 26)

F **(3)** The reason for omission to state the return date and the delay in serving the sealed *ex parte* order was mainly due to the Covid-19 pandemic and the MCO. The non-compliance with the ROC was unintentional and did not cause any prejudice or miscarriage of justice to the defendant. It amounted to an irregularity which was curable under O. 2 r. 1 of the G ROC. The preliminary objections were disallowed. Since the grounds stated in encl. 169 were the same or similar to the preliminary objections, encl. 169 was also dismissed. (paras 30, 35 & 36)

(4) The criteria for the grant of a post-judgment *Mareva* injunction is that: (i) there are assets of the defendants within jurisdiction of the court; and H (ii) there is a real risk of dissipation of these assets by the defendants to defeat the judgment. As this was an application for a post-judgment *Mareva* injunction where judgment for liability had already been made against the defendant, the plaintiff had already fulfilled the requirement that she had a good arguable case. The defendant did have assets within the jurisdiction. Therefore, the first requirement had been satisfied. The I plaintiff had also satisfied the second requirement and had shown that

there was a real risk of dissipation of assets by the defendant before the assessment of damages had been heard and decided by the court. There was a real danger that the judgment for damages would prove fruitless if the *Mareva* injunction was disallowed. (paras 37, 38 & 46)

Case(s) referred to:

Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd [2015] 5 CLJ 652 HC ***(refd)***
Chio Tan Seng & Ors v. Chong Chai Huat & Ors [1997] 4 CLJ Supp 116 HC ***(refd)***
George Pathmanathan Michael Gandhi Nathan v. Portcullis International Ltd & Ors [2017] 1 LNS 1222 HC ***(refd)***
Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 HC ***(refd)***
Hong Kim Sime v. Malayan Banking Bhd [1999] 3 CLJ 731 FC ***(refd)***
John Denis De Silva v. Crescent Court Management Corporation [2006] 2 CLJ 605 HC ***(refd)***
Nasip Roslan v. Director Of Public Works Department & Ors [2020] 1 LNS 1917 HC ***(refd)***
Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors [2018] 1 LNS 1426 HC ***(refd)***
RBA Engineering (M) Sdn Bhd v. Sharikat Galian Razak Sdn Bhd [2014] 1 LNS 1833 HC ***(refd)***
Re: Hong Kim Sime; Ex Parte: Malayan Banking Bhd [1994] 3 CLJ 646 HC ***(refd)***
Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***
Robert Doran & Ors v. Kuan Pek Seng & Ors [2010] 6 CLJ 105 HC ***(refd)***
Rosnah Kamarul Zaman & Ors v. Extreme Chocolate Sdn Bhd & Anor [2010] 1 LNS 113 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 11(1)
Rules of Court 2012, O. 1A, O. 2 rr. 1, 3, O. 29 r. 1(2), (2A), (2BA), O. 41 rr. 1(7), (8), 4
Subordinate Courts Act 1948, s. 2, Fourth Schedule
Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2

For the plaintiff - Alex Decena, Jordan Kong & Leslie Chaw; M/s Jayasuriya Kah & Co
For the defendant - Jeyan Marimuttu & Eric Chong; M/s J Marimuttu & Partners

Reported by Lina E

JUDGMENT

(encls. 140 & 169)

Leonard David Shim JC:

[1] This is an application by the plaintiff for a post-judgment *Mareva* injunction (encl. 140). The orders sought by the plaintiff against the defendant are as follows:

(i) The above-named defendant must not:

(a) remove from Malaysia any of his assets which are in Malaysia whether in his own name or not and whether solely or jointly owned up to the value of RM30m or any other amount that this Honourable Court deems fit and appropriate; or

A (b) in any way, dispose or deal with or diminish the value of any of his assets whether they are in or outside Malaysia, whether in his own name or not and whether solely or jointly owned up to the same value.

(ii) This prohibition includes the following assets, in particular:

B (a) any credit balance or monies as may or may hereafter be held at any bank, finance company or other financial institution including but not limited to the defendant's bank account;

(b) any real property; and

C (c) any shares and/or shares in any of the following companies;

(iii) If the total unencumbered value of the defendant's assets in Malaysia exceeds RM30m, the defendant may remove any of those assets from Malaysia or may dispose of or deal with them so long as the total D unencumbered value of their assets still in Malaysia remains not less than RM30m. If the total unencumbered value of the defendant's assets in Malaysia does not exceed RM30m, the defendant must not remove any of those assets from Malaysia and must not dispose of or deal with any of them, but if the defendant has other assets outside Malaysia, the E defendant may dispose of or deal with those assets so long as the total unencumbered value of all their assets whether in or outside Malaysia, remains not less than RM30m.

(iv) The defendant must inform the plaintiff in writing at once:

F (a) of all his assets whether in or outside Malaysia whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets, which include:

(1) the identity of all bank accounts;

(2) full details on shareholdings in any company;

G (3) overdraft or loan facility identifying the nature and terms of the facility and state of the indebtedness;

(4) any debts owed to them by any person, partnership or body corporate, identifying the amount of such debt, stating how it arose and when the same is payable;

H

(5) real property; and

(6) any property, real or personal, held on behalf of or in trust for them.

I (v) The above information must be confirmed in an affidavit which must be served on the plaintiff's advocates within ten days after this order has been served on the defendant.

[2] The grounds of this application are as follows:

(i) Judgment on liability has been entered against the defendant in 2015 and the assessment of damages has been fixed on 25 to 29 February 2021.

(ii) The defendant has assets within the jurisdiction. See para. 33 of the affidavit in support (encl. 141).

(iii) There is a real risk of dissipation of the assets and any judgment sum awarded by the court in favour of the plaintiff after the trial of the assessment of damages would remain unsatisfied. See paras. 34 to 45 of encl. 141.

[3] The *ex parte* notice of application (encl. 140) was heard and an *ex parte Mareva* injunction order was granted by this court on 11 January 2021 (encl. 163).

[4] On 26 January 2021, the defendant filed a notice of application (encl. 169) to set aside and discharge the *ex parte* injunction order (encl. 163).

[5] The grounds of the defendant's application (encl. 169) are as follows:

(i) The plaintiff's affidavit in support affirmed on 5 January 2021 was not properly affirmed in accordance with O. 41 r. 1 of the Rules of Court 2012 (ROC) read together with s. 11 of the Courts of Judicature Act 1964 and the jurat thereto fail to comply with the strict requirements of the said O. 41 and Form 74 of Appendix A of the ROC. That the oath of affirmation was not administered by a competent person in accordance with the mandatory provisions of said order and rules of the ROC. Accordingly, the plaintiff's application under encl. 140, cannot be sustained.

(ii) Further the plaintiff's affidavit in support is defective and cannot be cured as the very basis of the jurat and the affirmation is in itself defective.

(iii) By reason of para. 2(i) and 2(ii) hereof, plaintiff's *ex parte* notice of application remains unsupported by any affidavit in breach of O. 29 r. 1(2) and (2A) of the Rules of Court 2012 (ROC). Accordingly, it is wholly defective and a non-starter.

(iv) Both the notice of application and the unsealed copy of the purported *ex parte Mareva* injunction order served on us on 12 January 2021 has no return date. This is in breach of the mandatory requirement of O. 29 r. 1(2BA) of ROC.

(v) The sealed copy *ex parte Mareva* injunction order dated 11 January 2021 has not been served within seven days from the date of the order in accordance with the mandatory requirements of O. 29 r. 1(2BA) of ROC.

[6] In addition, the defendant raised the following preliminary objections (POs) to encl. 140 and 141:

(i) The plaintiff's affidavit in support affirmed on 5 January 2021 was not properly affirmed in accordance with O. 41 r. 1 of the Rules of Court 2012 (ROC) read together with s. 11 of the Courts of Judicature Act 1964 and the jurat thereto fail to comply with the strict requirements of the said O. 41 and Form 74 of Appendix A of the ROC. That the oath of affirmation was not administered by a competent person in accordance with the mandatory provisions of the said order and rules of the ROC. Accordingly, the plaintiff's application under encl. 140, cannot be sustained.

(ii) Further, the plaintiff's affidavit in support is defective and cannot be cured as the very basis of the jurat and the affirmation is in itself defective.

(iii) By reason of para. 2(i) and 2(ii) hereof, plaintiff's *ex parte* notice of application remains unsupported by any affidavit in breach of O. 29 r. 1(2) and (2A) of the Rules of Court 2012 (ROC). Accordingly, it is wholly defective and a non-starter.

(iv) Both the notice of application and the unsealed copy of the purported *ex parte Mareva* injunction order served on us on 12 January 2021 has no return date. This is in breach of the mandatory requirement of O. 29 r. 1(2BA) of ROC.

(v) The sealed copy *ex parte Mareva* injunction order dated 11 January 2021 has not been served within seven days from the date of the order in accordance with the mandatory requirements of O. 29 r. 1(2BA) of ROC.

[7] As the grounds raised in encl. 169 for setting aside the *ex parte Mareva* injunction order (encl. 163) and the POs are the same or similar, the parties agreed that the POs and encl. 169 be heard together with the *inter partes* hearing of encl. 140.

Preliminary Objections

[8] POs (i) - (iii) are interrelated and will be considered collectively below. Learned counsel for the defendant contends that by reason of the substantial and material defects as set out in the POs, the plaintiff's *ex parte* notice of application cannot be sustained in law. The defendant relied on the High Court's decision in *Re: Hong Kim Sime; Ex Parte: Malayan Banking Bhd* [1994] 3 CLJ 646; [1994] 3 MLJ 261.

[9] The defendant contends that there is no affidavit in support to the plaintiff's *ex parte* notice of application as the affidavit in support is wholly defective and is not affirmed before a competent person. It is both in breach of O. 41 r. 1(7) and (8) read together with s. 11 of the Courts of Judicature Act 1964 and Form 74 in Appendix A of the ROC.

[10] The Federal Court in *Hong Kim Sime v. Malayan Banking Bhd* [1999] 3 CLJ 731; [1999] 4 MLJ 257 affirmed the High Court decision that Justices of Peace are not competent to administer oath in respect of affidavit in High Court proceedings. At p. 763 (CLJ); para H p. 260 (MLJ) "... nor could a Justice of the Peace in Sabah, as such, comes under the phrase 'person authorised to administer oaths in the High Court'.

[11] In the present case, the defendant submitted that the plaintiff's affidavit in support was affirmed before a "Justice of Peace" who is not competent to so administer oath in respect of affidavits filed in High Court proceedings. Accordingly, there is no affidavit in support of the plaintiff's application and it follows that the application must fall.

[12] The defendant further submitted that the defect cannot be cured pursuant to O. 2 as the defect goes to the very substance of the affidavit in support and is not a mere procedural defect or a defect in form.

[13] Reliance was made by the defendant to the case of *Han Euu Tiam v. Phang Kui Fatt & Ors* [1999] 4 CLJ 395; [1999] 4 MLJ 683, Justice Mohd Hishamudin in High Court held:

> In my judgment there is merit in this preliminary objection. Clearly there has not been compliance with O. 41(7) and (8) and Form 78 ...

And further at p. 401 (CLJ); p. 688 para B-D (MLJ) ...

> To sum up, it is my finding that there has been a departure from the prescribed format and that such departure is not trivial in nature. There has been a substantial deviation. In view of this substantial deviation and bearing in mind that O. 41 r. 1(7) and (8) use the word 'must', I am unable to accept the jurat, as used by the plaintiff, as a valid jurat. To my mind, the extent of the defect is serious; it is as good as not having a jurat. In my judgment, strict compliance with the prescribed format is mandatory. Without a jurat or without a valid jurat, the affidavits are defective and therefore cannot be accepted. The interlocutory application is thus without a supporting affidavit. It must fail.

[14] Accordingly, it is submitted by the defendant that the plaintiff's *ex parte* notice of application must be dismissed and struck out with costs and that an order for damages be given.

[15] On the contrary, the plaintiff contends that the judgment of the High Court and the Federal Court in *Re Hong Kim Sime*'s case should be treated with abundance of caution because Justice Ian Chin, when deciding the case,

considered the repealed Justice of the Peace Ordinance 1961 ("1961 Ordinance"). The 1961 Ordinance was repealed in 1980 by the Subordinate Courts Act (Extension) Order 1980 (P.U.(A) 357/1980) ("SCA (Extension) Order 1980"). SCA (Extension) Order 1980 reads:

Fifth Schedule	Add –
	Sabah Cap. 29 The Subordinate Courts Ordinance and any rules of court made thereunder
	The whole
	Sarawak Cap. 42
	The Subordinate Courts Ordinance and any rules of the court made thereunder The whole
	Sabah Ordinance No. 2 of 1961
	The Justices of the Peace Ordinance 1961
	The whole

[16] Since the 1961 Ordinance was repealed, it was submitted that Justice Ian Chin should not have considered the 1961 Ordinance when deciding the case. Justice Ian Chin stated:

> A JP of Sabah is governed by separate legislation, which are the Justice of the Peace Ordinance 1961, s. 99(2) of the Subordinate Courts Act 1948 and the Subordinate Courts (Powers of Justice of the Peace) (Sabah) Regulations 1990, all of which I have already quoted.

[17] Therefore, the plaintiff submitted that this court should disregard the cases of *Re: Hong Kim Sime; Ex Parte: Malayan Banking Bhd* [1994] 3 CLJ 646; [1994] 3 MLJ 261, HC and *Hong Kim Sime v. Malayan Banking Bhd* [1999] 3 CLJ 73; [1999] 4 MLJ 257, FC.

[18] Secondly, the plaintiff submitted that a JP is competent and authorised to affirm the AIS for the following reasons:

(i) Section 99(2) of the Subordinate Courts Act 1948 ("SCA 1948") confers on JP in Sabah such powers and duties as conferred or imposed upon them by any written law. In reading SCA 1948, we must take into account the modifications made to the SCA 1948 by the SCA (Extension) Order 1980. Section 99 should read as follows:

> 99
>
> Powers of Justices of the Peace
>
> 99 (1) Justices of the Peace in West Malaysia ...
>
> (2) *Justices of the Peace in Sabah shall have and shall exercise and perform such powers and duties as may be conferred or imposed upon them by any written law*. They shall also *have such other powers and*

duties as the Minister may by regulations confer or impose upon them and the Minister may confer or impose the said powers and duties upon all or any of the Justices of the Peace.

(3) ...

(4) ...

(5) ...

(ii) The written law as made by the Minister being the Subordinate Courts (Powers of Justice of Peace) (Sabah) Regulations 1990 ("1990 Regulation"). It reads:

These Regulations shall **apply only to the State of Sabah**

2. **Every Justice of Peace** shall be authorised and is required:

(a) **to administer oaths and affirmations**;

(b) to **make and receive statutory declarations**; and

(c) **to attest signatures**,

UNDER any written law OR when otherwise required to do so **as though such Justice of the Peace were a Second Class Magistrate**.

(iii) Since there is an "or" in the 1990 Regulation, the provision should be read disjunctively.

(iv) Firstly, the plaintiff submitted that the written law in the 1990 Regulation can be the ROC 2012, and therefore, the 1990 Regulation grants JP the powers to administer oaths and affirmations under the ROC.

(v) It is important to note that O. 41 r. 1(7) of the ROC does not state that an affidavit must be affirmed by a JP. The defendant heavily relies on O. 41 r. 1(8) and Form 74, which states "Commissioner of Oaths" at the bottom of Form 74. However, the plaintiff submits that Form 74 should not be slavishly adhered to. Order 1 r. 7 ROC allows the forms in Appendix A, which includes the forms of jurat in Form 74, to be varied only "as the circumstances of the particular case require". The plaintiff also submits that JP in West Malaysia does not have similar powers to that of JP in Sabah. JP in Sabah is an exclusive breed governed by the SCA 1948 and the 1990 Regulation.

(vi) Secondly, the plaintiff also submit that the 1990 Regulation also gives a JP the power to administer oath and affirmation as though such JP is a Second Class Magistrate. Hence, can a Second Class Magistrate/ JP affirm an affidavit in the High Court? The plaintiff answer is in the affirmative.

(vii) Pursuant to the Fourth Schedule of the SCA 1948, and incorporating the amendments made by the SCA (Extension) Order 1980, the Fourth Schedule should read as follows:

EX OFFICIO SECOND CLASS MAGISTRATES

For their respective States

Assistant Registrar of the Subordinate Courts.

For their respective States District Officers in Sabah

Assistant District Officers in Sabah

(viii) It was established by the plaintiff that the 1990 Regulation grants JP powers to administer oaths and affirmation as though he were a Second Class Magistrate. And *ex officio* Second Class Magistrates includes an Assistant Registrars of the subordinate courts.

(ix) Assistant Registrars of the subordinate courts fall under the definition of Registrars under s. 2 of the SCA 1948. Section 2 reads:

> 'Registrar' means the Registrar, Deputy Registrar, Senior Assistant Registrar or Assistant Registrar of the Subordinate Courts.

(x) Thus, the plaintiff submits that a JP being a Second Class Magistrate is also an Assistant Registrar of the subordinate courts by virtue of the Fourth Schedule SCA 1948, and therefore, also a Registrar by virtue of s. 2 of the SCA 1948.

(xi) As a result, a JP falls under the ambit of the definition of Registrar under s. 11(1) of CJA 1964. Section 11 reads:

> (1) Any Registrar and any person appointed by the Chief Justice to be a Commissioner for Oaths (subject to any limitations expressed in his appointment) may do all or any of the following things:
>
> (a) receive acknowledgments of married women in all cases where acknowledgments are required by law to be taken before a public officer;
>
> (b) receive acknowledgments of recognizances of bail and bail-bonds;
>
> (c) administer oaths for:
>
> (i) the justification for bail;
>
> (ii) taking any affidavit or affirmation;
>
> (iii) receiving and taking the answer, plea, demurrer, disclaimer, allegation or examination of any party or parties to any action;

(iv) the examination of any witnesses upon any interrogatories or *de bene esse* or in chief or on any other occasions;

(v) swearing executors and administrators; and

(vi) swearing persons in any action, matter or proceeding, which is pending or about to be instituted in any court in any of its jurisdictions; and

(d) take and receive statutory declarations.

(xii) In conclusion, by reading the 1990 Regulation, SCA (Extension) Order 1980, s. 99(2) of SCA 1948, Fourth Schedule of SCA 1948, s. 2 of SCA 1948 and s. 11(1) of CJA 1964, the plaintiff submitted that the law is clear that JP is competent and authorised to affirm the plaintiff's AIS.

Court's Findings On The Preliminary Objections

[19] As the Justice of the Peace Ordinance 1961 was repealed by the Subordinate Courts Act (Extension) Order 1980 (P.U(A) 357/1980), the repealed Act is not applicable to this case. The High Court decision of *Re Hong Kim Sime* which relied on the repealed Act is to be read carefully and should not be read out of context. In *Re Hong Kim Sime*'s case, the High Court held:

> [1] *An affidavit sworn in Malaysia or Singapore must be affirmed or sworn before a person authorised to administer oaths in the High Court or a Magistrate. The people who are authorised to administer oaths in the High Court are the Registrars of the High Court including deputies and assistants and this is provided for in s. 11 of the Courts of Judicature Act 1964; a JP was obviously not one of them.* The specific and exhaustive categorisation in s. 128 of the Act of the persons qualified to take affidavits meant that only those specified persons and no other could take affidavits for use in bankruptcy proceedings unless rules made under the Act otherwise provided. A JP was specifically allowed to take affidavits if the affidavit was to be taken *outside* Malaysia or Singapore. Section 128 made it clear that a *JP was not a person authorised to administer oaths in the High Court unless a JP could come within the definition of "Magistrate".*
>
> [2] The word "Magistrate is not defined by the Act. The Interpretation Acts 1948 and 1967 defines the word to mean "a Magistrate appointed under any written law providing for the appointment of Magistrates". Magistrates, both first and second class, are appointed under the provisions of the Subordinate Courts Act 1948. In West Malaysia, a JP has power to exercise within the state for which he is appointed such powers not exceeding the powers of a second class Magistrate as may be conferred upon them by any written law (see s. 99(1) of the Subordinate Courts Act 1948). A JP of Sabah is governed by separate legislation. *The court was of the view that the deeming provision of s. 4(1) of the Justices of the Peace Ordinance and the specific provision of the Subordinate Courts (Powers of Justices*

A *of the Peace) (Sabah) Regulations 1990, made it clear that a JP was to take affidavits as if he was a Magistrate of the second class. Since a JP was clothed with such power as if he was a second class Magistrate, he could equally be regarded as having been appointed a second class Magistrate. The Subordinate Courts Act 1948 contains provisions governing the appointment of a second class Magistrate and the word "Magistrate" has been used there generically and therefore admits of*
B *Magistrates of both classes. The court was therefore of the view that a JP of Sabah could take affidavits for the purposes of bankruptcy proceedings because a JP was to be regarded as a Magistrate for the purposes of s. 128(a) of the Act.*

[20] Further, s. 99(2) of the Subordinate Courts Act 1948 confers powers on Justices of the Peace in Sabah and reg. 2 thereto authorises every JP in
C Sabah to administer oaths and affirmations and attest signatures under any written law as through he or she is Second Class Magistrate. See *Hong Kim Sime v. Malayan Banking Bhd* [1999] 3 CLJ 731, where the Federal Court (per Chong Siew Fai CJ (Sabah & Sarawak)) held:

D [1] Section 128 of the Act does not expressly include a JP nor can a JP come under the phrase "person authorised to administer oaths in the High Court" appearing therein. Further, the word "magistrate" is not defined in the Act. However, s. 128 is expressed to be "Subject to general rules made by the Minister".

E [2] By virtue of s. 3 of the Interpretation Acts 1948 and 1967 read with s. 79(2) of the Subordinate Courts Act 1948, the word "magistrate" in s. 128(a) of the Act includes a second class magistrate.

[3] *Section 99(2) of the Subordinate Courts Act 1948 confers powers on justices of the peace in Sabah and by virtue of this provision, the Minister had made the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990. Regulation 2 thereto has the effect of authorising every JP in Sabah to administer*
F *oaths and affirmations and to attest signatures under any written law as though he or she were a second class magistrate.*

[21] In the present case, O. 41 r. 1(7) of the ROC 2012 does not state that an affidavit must be affirmed before and attested by a Commissioner for
G Oaths. Neither does O. 41 r. 1(7) expressly provide that a JP is not competent to attest an affidavit to be filed in the High Court.

[22] Pursuant to the Fourth Schedule of the SCA 1948 read with the SCA (Extension) Order 1980, *ex officio* Second Class Magistrate includes Assistant Registrar of the subordinate courts. Assistant Registrars of the subordinate
H courts falls under the definition of Registrars under s. 2 of the SCA 1948 which reads:

'Registrar' means the Registrar, Deputy Registrar, Senior Assistant Registrar or Assistant Registrar of the Subordinate Courts.

I **[23]** The words "Any Registrar" in s. 11 of the Courts of Judicature Act 1964 is wide enough to include Assistant Registrar of the subordinate courts. Hence, by virtue of s. 99(2) SCA 1948, this court finds that a JP falls within the definition of Registrar under s. 11 which reads:

(1) **Any Registrar** and any person appointed by the Chief Justice to be a Commissioner for Oaths (subject to any limitations expressed in his appointment) may do all or any of the following things:

(a) receive acknowledgments of married women in all cases where acknowledgments are required by law to be taken before a public officer;

(b) receive acknowledgments of recognizances of bail and bail-bonds;

(c) administer oaths for:

(i) the justification for bail;

(ii) taking any affidavit or affirmation;

(iii) receiving and taking the answer, plea, demurrer, disclaimer, allegation or examination of any party or parties to any action;

(iv) the examination of any witnesses upon any interrogatories or *de bene esse* or in chief or on any other occasions;

(v) swearing executors and administrators; and

(vi) swearing persons in any action, matter or proceeding, which is pending or about to be instituted in any court in any of its jurisdictions; and

(d) take and receive statutory declarations.

[24] A careful reading of the decision in *Hong Kim Sime*'s case shows that the Federal Court did not expressly state or make any specific finding that a JP cannot attest an affidavit for non-bankruptcy proceedings in the High Court. If a JP in Sabah is competent to attest an affidavit in a bankruptcy petition which is filed and heard in the High Court, there is no plausible or valid reason for holding that a JP cannot attest on affidavit in non-bankruptcy cases in the High Court. I would echo the sentiment express by the High Court in *Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors* [2018] 1 LNS 1426, where Wong Chee Lin JC as Her Ladyship then was, found that:

> [74] The provision in **O. 38 r. 2(2), in my view, gives the court a discretion whether to allow the affidavits of the plaintiff and her husband to be referred to in evidence or not**.
>
> [75] In *Curley v. Duff* [1985] 2 NSWLR 716 it was held that:
>
> > *There is no reason in policy why an affidavit which was taken before a Justice of the Peace or a solicitor and is in proper form and deals with admissible and relevant material, should not be received by the court and indeed, in the interest of justice it should be because otherwise the court is faced with almost the farce of saying that there is no evidence on a matter when evidence in proper form could be put before it*. If, of course, a party says

A

> that he would have liked to cross examine the deponent, but cannot do so because she is dead, that is a matter that will be taken into consideration in the weight that the evidence will have, but I do not see why it is inadmissible.

[25] In the premises and applying the aforementioned authorities to the
B instant case, this court finds that a JP in Sabah is competent to attest an affidavit for any legal proceedings in the subordinate court and the High Court.

[26] As a JP is empowered by law to administer the oath and attest affidavit in Sabah, the defendant is not prejudiced by the attestation by a JP of the
C affidavit in support (encl. 141). If there is any defect in the attestation of the affidavit in support, it would be a mere irregularity which is curable under O. 2 r. 1 and admissible by the court under O. 41 r. 4 ROC 2012. See *RBA Engineering (M) Sdn Bhd v. Sharikat Galian Razak Sdn Bhd* [2014] 1 LNS 1833; *Chio Tan Seng & Ors v. Chong Chai Huat & Ors* [1997] 4 CLJ Supp 116;
D and *Nasip Roslan v. Director Of Public Works Department & Ors* [2020] 1 LNS 1917; [2020] MLJU 1253.

[27] The fourth PO concerns the absence of a return date in the *ex parte* notice of application and the *ex parte Mareva* order. The plaintiff explained that initially a return date was given on 25 January 2021 but it was converted
E to an e-review due to the imposition of a movement control order in Sabah. During the e-review on 26 January 2021, learned counsel for the defendant informed that court, *inter alia*, that the defendant had raised the POs and a new date was fixed for the *inter partes* hearing of encl. 140 on 1 February 2021. It is evident that the omission to state the return date in
F encl. 141 and 163 did not cause any prejudice or miscarriage of justice to the defendant.

[28] The fifth PO is regarding the delay of two days in the service of the sealed *ex parte Mareva* order (encl. 163). The plaintiff's advocates explained that soon after the *ex parte* order was granted by the court, they had filed a
G draft order in court for approval. However, despite several follow up and attempts to get in touch with High Court Registry, the approval and sealing of the *ex parte* order was delayed due to the imposition of the MCO. The plaintiff referred to the case of *John Denis De Silva v. Crescent Court Management Corporation* [2006] 2 CLJ 605; [2006] 3 MLJ 631, Abdul Malik
H Ishak J (as His Lordship then was) stated that:

> [3] On 2 November 2004, this court granted an *ex parte* injunction in favour of the plaintiff upon the terms of encl 3. By way of a preliminary objection, the defendant took umbrage to the fact that the plaintiff did not, up to the date of the filing of enclosure 11 (that would be on 19 November
I 2004), serve the *ex parte* injunction order on the defendant and this meant, according to the defendant, that the plaintiff had failed to comply with O. 29 r. 1(2BA) of the Rules of the High Court 1980 ('RHC') which reads as follows:

(2BA) The *ex parte* interim injunction must be served on the relevant party within one week of the date of the order granting the interim injunction, and the court when granting the injunction must forthwith fix a date for *inter partes* hearing to be held before the expiry of the 21 days.

The plaintiff explained that the delay in the service of the *ex parte* injunction order was entirely due to the court. It was said that the court returned the sealed copy late. The plaintiff was apologetic about the whole matter. The Deepavali and the Hari Raya Puasa breaks of 2004 were instrumental for the delay because on those days the relevant court officers were on leave. Order 1A of the RHC must be read with O. 2 r. 1(1) of the RHC as well as with O. 2 r. 3 of the RHC and, when so read, the preliminary objection advanced by the defendant would come to naught. Of pertinence would be the need to have regard to the justice of the particular case and not to be shackled by any technical non-compliance of any of the rules of the RHC. Order 1A of the RHC reads as follows:

ORDER 1A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Order 2 r. 1(1) of the RHC states as follows:

Non-compliance with rules (O. 2 r. 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

And finally, O. 2 r. 3 of the RHC states as follows:

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such noncompliance has occasioned a substantial miscarriage of justice.

[4] It is common knowledge that during the festive occasions particularly during the Deepavali and the Hari Raya Puasa breaks of 2004 many court officers were on leave. It is a common phenomenon throughout the

whole country. I can certainly take judicial notice of it. Certain facts are certainly beyond dispute. They are so notorious or that they are of such common knowledge that they require no proof and no evidence in rebuttal need to be advanced. Examples of judicial notice without the need to hold an inquiry are abound. The following authorities would serve as the guiding principles:

(1) *R v. Luffe* (1807) 8 East 193;

(2) *Preston-Jones v. Preston-Jones* [1951] AC 391 (HL);

(3) *Burns v. Edman* [1970] 2 QB 541;

(4) *Re Oxford Poor Rate Case* (1857) 8 E & B 184;

(5) *Nye v. Niblett* [1918] 1 KB 23;

(6) *Dennis v. White* [1916] 2 KB 1;

(7) *Huth v. Huth* [1915] 3 KB 32 (CA);

(8) *R v. Simpson* [1983] 1 WLR 1494 (CA);

(9) *DPP v. Hynde* [1998] 1 All ER 649 (CA); and

(10) *R v. Yap Chuan Ching* (1976) 63 Cr App R 7 (CA)

[5] Thus, it was **not surprising that the sealed copy of the *ex parte* injunction order was extracted** late and with the result that it **was served late on the defendant**. For these reasons, I **dismissed the defendant's preliminary objection forthwith**. **I must now examine the merits** of the *inter partes* application in encl 3.

[29] The plaintiff submitted that the High Court in *John Denis de Silva*'s case above considered the old Rules of the High Court 1980. Nevertheless, the new ROC is similar, except for:

(i) Order 1A of the ROC, which now includes the word "overriding interest of justice"; and

(ii) Order 2 r. 3 of the ROC which now includes: "occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both".

[30] From the affidavit evidence and submissions of both parties, this court finds that the reason for omission to state the return date and the delay in serving the sealed *ex parte* order was mainly due to the Covid-19 pandemic and the MCO. The non-compliance with the ROC 2012 complained of by the defendant in the fourth and fifth POs was unintentional and did not cause any prejudice or miscarriage of justice to the defendant. It amounted to an irregularity which is curable under O. 2 r. 1 ROC 2012.

[31] Order 1A "Court or Judge shall have Regard to Justice" ROC 2012 states:

> In administering these Rules, the Court or Judge **shall have regard to the overriding interest of justice and not only to the technical non-compliance** with these Rules.

[32] Order 2 r. 1 "Effect of Non-Compliance" ROC 2012 states:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirements of these Rules, **the non-compliance shall be treated as an irregularity and shall not nullify the proceedings**, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) **These Rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly**. The parties are required to assist the court to achieve this overriding objective.
>
> (3) The court or Judge may, on the ground that there has been such non-compliance as referred to in *paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity*.

[33] O. 2 r. 3 provides:

> 3. **A court or Judge shall not allow any preliminary objection** by any party to any cause or matter or proceedings **only on the ground of non-compliance of any provision of these Rules unless** the court or Judge is of the opinion that **such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both**.

[34] In *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296; [2017] 5 MLJ 359 it was stated by the Court of Appeal that:

> [6] In the light of O. 1A & O. 2 of the RC 2012, it is not an option anymore for the court to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the *fiat* of the court. *It is only in extremely rare cases where the non-compliance cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs*.

[35] Having regard to the overriding interest of justice and applying the aforesaid authorities to the present case, the POs are disallowed with costs to be determined together with encls. 140 and 169.

A **Enclosure 169**

[36] It is not disputed that the grounds stated in the setting aside application (encl. 169) are the same or similar to the above POs raised by the defendant which this court has disallowed. Based on the reasons given above, it leads to the same conclusion and encl. 169 is dismissed with costs to be dealt with
B hereinbelow.

Enclosure 140

[37] The plaintiff's application in encl. 140 is for a post judgment *Mareva* injunction to restrain the defendant from dissipating or disposing of his assets
C up to the value RM30m or any other amount that this court deems fit and appropriate. The principle applicable to a post-judgment *Mareva* injunction application is trite. In *George Pathmanathan Michael Gandhi Nathan v. Portcullis International Ltd & Ors* [2017] 1 LNS 1222, the High Court (per Azizah Haji Nawawi J as Her Ladyship then was) stated as follows:

D [11] In *Pek Seng Co. Ltd & Ors v. Low Tin Kee & Ors* [1989] 1 LNS 175; [1990] 1 MLJ 75, Chan Sek Keong held that:

> The justification of a *Mareva* Injunction is the existence of a real risk that any judgment that has been or may be obtained by the plaintiff against the defendant may not be satisfied if the
E defendant is allowed to continue to deal with his assets freely. Its object is to prevent it from happening. The *court therefore needs only to be satisfied that two conditions exist before granting such an injunction: (1) the existence of a real risk of dissipation and (2) the existence of assets within the control of the defendant*.

F [12] The above position in Singapore was adopted in the case of *Goh Cheng Kum & Anor v. Acepoint Venture Sdn Bhd & 8 Ors* [22-NCVC-78-01-2012], where Justice Vazeer Alam Mydin Meera held as follows:

> Therefore, in summary the *criteria for grant of a post–judgment Mareva Injunction* is that:
>
> G (a) There are *assets of the defendants within jurisdiction of this court*; and
>
> (b) There is a *real risk of dissipation of these assets by the defendants to defeat the judgment*.

[7] As pointed out earlier, the 1st defendant's main asset is its shareholding in MMG. Therefore, there is no denying that the 1st
H defendant has assets within jurisdiction. Therefore, the first criterion is met.

[8] On the question *of risk of dissipation of assets, it is trite that the plaintiff must demonstrate that the defendant's previous actions and/or conduct show that their probity is not to be relied upon and that from the lack of probity thereof there is a*
I *risk that the assets of the defendant will be dissipated*. See: *Ang Chee Huat*

v. Engelbach Thomas Joseph [1995] 2 CLJ 893; [1995] 2 MLJ 83; and *S & F International Limited v. Trans - Con Engineering Sdn Bhd* [1985] CLJ (Rep) 280; [1985] 1 MLJ 62. The *lack of probity must go hand in hand with some evidence that shows a risk of dissipation of assets*. See: *Ikatan Innovasi Sdn Bhd v. KACC Construction Sdn Bhd* [2008] 3 CLJ 48; and *Pacific Centre Sdn Bhd v. United Engineers (M) Sdn Bhd* [1984] 2 CLJ (Rep) 319.

[13] Therefore, before granting the post judgment *Mareva* Injunction, this court must consider the following matters:

(i) that the *Respondent must show clear evidence that the Petitioner has assets within the jurisdiction* of this court; and

(ii) that the *Respondent must show clear evidence that there is a real risk that the assets in the time deposits may be dissipated before execution of the Consent Order*.

[38] As this is an application for a post-judgment *Mareva* injunction where judgment for liability has already been made by the court against the defendant, the plaintiff had already fulfilled the requirement that she has a good arguable case. Regarding the first issue, the affidavit evidence shows that the defendant does have assets within the jurisdiction. See para. 33 of the affidavit in support (encl. 141). The defendant did not adduce any or sufficient evidence to show otherwise in his affidavit in opposition (encl. 168). The main contention of the defendant in respect of this issue is that the plaintiff has not suffered any loss, if at all, it would only accrue to Sunlight Aqua Sdn Bhd. Therefore, the first issue or requirement of the defendant having assets within the jurisdiction is satisfied. The issue of whether the plaintiff has suffered any loss will be dealt with at the trial for assessment of damages.

Real Risk Of Dissipation Of Assets

[39] The plaintiff contended that there is a real risk of dissipation and affirmed in paras. 34 to 37 of the affidavit in support (encl. 141) as follows:

34. I respectfully state that there is a real risk that should the Application sought be refused, any judgment sum awarded by the court at the trial of the assessment of damages in favour of the plaintiff would remain unsatisfied.

35. The plaintiff successfully claimed damages for breach of contract against the defendant. His Lordship Judicial Commissioner Gabriel Gumis made a finding that the defendant fraudulently concealed the fact that he set up Sunlight Seafood to replace Sunlight Aqua as the company to enter into a joint venture with Inno Resource to develop the Pitas Project.

A

> 36. I am advised and believe that the defendant has repeatedly displayed a lack of probity and/or dishonesty and that there is a real risk of defendant dissipating his assets, not only in Sunlight Seafood but also of the defendant's shareholdings in the other companies, to circumvent any judgment and/or order which will be made against the defendant at the end of the trial of the assessment of damages.

B

> 37. In the circumstances, I am advised by my Advocates and believe that the Application for a *Mareva* Injunction ought to be granted in my favour.

[40] Where there has been a breach of contract and dishonesty, the courts were inclined to find that there was a real risk of dissipation. *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652 and *Rosnah bt Kamarul Zaman & Ors v. Extreme Chocolate Sdn Bhd & Anor* [2010] 1 LNS 113; [2011] 7 MLJ 249 are both cases where the High Court found that as a result of the breach of contract and breach of payment terms of the settlement agreement respectively, the breaching party was held to have lacked honesty and probity. For that reason, the risk of dissipation could be inferred.

C

D

[41] Another scenario where risk of dissipation could be inferred is where there is a scheme to defraud: *Robert Doran & Ors v. Kuan Pek Seng & Ors* [2010] 6 CLJ 105 and *Robert Lazar, Law and Practice of Injunctions in Malaysia*, Sweet & Maxwell, 2020.

E

[42] His Lordship Judicial Commissioner Gabriel Gumis (as he then was) in his grounds of judgment dated 30 December 2015 found that the defendant had breached the contract and had fraudulently concealed the fact that he incorporated Sunlight Seafood to replace Sunlight Aqua as the company to enter into a joint venture with Inno Resource to develop the Pitas Project.

F

[43] To quote His Lordship's in his grounds of judgment:

G

> The defendant had repudiated the agreement by refusing to respond to the plaintiff's many attempts to contact him about the progress of the project. The plaintiff continued to look for investors for the project and met Nobel Pang (PW4) who agreed to invest in the project. She complied with her side of the agreement to very end. Once she and the defendant succeeded in obtaining PEMANDU's approval as an anchor company for the project, with the availability of funding a certainty, the defendant, then repudiated the agreement by surreptitiously replace Sunlight Aqua Sdn. Bhd. as the company to be the joint venture partner with a subsidiary of Sabah Foundation. The plaintiff was dumped by the defendant after he had used her to successfully obtain PEMANDU's approval of Sunlight Aqua Sdn. Bhd. as the anchor company.

H

[44] The findings and decision of YA Tuan Gabriel Gumis JC on liability in relation of breach of contract and fraudulent conduct by the defendant was affirmed by the Federal Court.

I

[45] As the defendant's previous action and/or conduct shows the lack of probity by the defendant who was found to have hijacked or diverted Sunlight Aqua's interest in the Pitas Project to a joint venture company (Sunlight Inno Sdn Bhd) by replacing Sunlight Aqua Sdn Bhd (where the plaintiff held 49% shares) with Sunlight Seafood (Sabah) Sdn Bhd (where the defendant owned (80%) of the shares and claimed to be the beneficial owner the remaining 20% shares in Sunlight Seafood). There is undisputed evidence which shows that the defendant had sought the approval at the Board of Directors meeting of Sunlight Seafood held on 1 December 2020 to transfer 80% of the defendant's shares in Sunlight Seafood to Hualang Aquaculture Sdn Bhd and Hualang Capital Sdn Bhd.

[46] From the affidavit evidence, the plaintiff has satisfied the second requirement and has shown that there is real risk of dissipation of assets by the defendant before the assessment of damages has been heard and decided by the court. There is a real danger that the judgment for damages will prove fruitless if the *Mareva* injunction is disallowed.

[47] I have considered the other issues and points raised by the parties and I am respectfully of the view that it has not persuaded me to change my findings hereinabove.

[48] Further, this court does not find the terms of the *ex parte* order to be onerous and oppressive. There is evidence adduced by the plaintiff to show that she would have sold 30% of her shares in Sunlight Aqua to a potential buyer/investor for RM30m had the Pitas Project not been diverted to Sunlight Seafood and the joint venture company by the defendant. The defendant disputed the plaintiff's evidence and this is an evidential or triable issue to be determined at the assessment of damages. However, at this stage, this court does not find that the plaintiff has cast her net too wide by seeking a *Mareva* injunction to restrain dealing of assets up to the value of RM30m.

[49] The defendant contends that the monthly spending limit of RM20,000 is insufficient to meet his monthly living expenses, legal costs and servicing bank loans amounting to RM60,000. However, there is no documentary evidence adduced to prove or substantiate the defendant's contention regarding the total amount of his monthly expenses.

[50] Based on the aforesaid reason, the *inter partes* application for a *Mareva* injunction is allowed in terms of encl. 140 except that the monthly spending limit in prayer 6 be increased to RM30,000 from RM20,000.

[51] It is further ordered that the costs of the POs, encl. 140 and encl. 169 in the sum of RM8,000 shall be paid by the defendant to the plaintiff subject to payment of allocatur fee.